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**ADVISORY LEGAL OPINION  
TO THE PARLIAMENTARY COMMITTEE ON JUSTICE AND LEGAL AFFAIRS**

***THE IMPLICATION OF NOT SETTING UP THE CONSTITUTIONAL  
COMMISSION WITHIN THE STIPULATED TIMEFRAMES AND THE OPTIONS  
FOR UNLOCKING THE IMPASSE ON THE REPORT OF THE INTERIM  
INDEPENDENT BOUNDARIES REVIEW COMMISSION***

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**Law Society of Kenya**

1. The Law Society of Kenya is 8,355 member body corporate established by the Law Society of Kenya Act Chapter 18 of the Laws of Kenya. One of its statutory objects as provided in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.
2. Pursuant to this statutory mandate, the Law Society of Kenya is invited to give an Advisory opinion on
  - a) the implication of not setting up the constitutional commission to wit; the Constitution of Kenya Implementation Commission, The Commission on Revenue Allocation and the Judicial Service Commission; within the stipulated timeframes; and
  - b) the options for unlocking the impasse on the report of the Interim Independent Boundaries Review Commission.
3. We considered such laws as we deemed necessary for the purpose of the opinion expressed herein and the following in particular:-
  - a) Section 41B of the Constitution of Kenya (Amendment) Act, 2008 which established Interim Independent Boundaries Review Commission was
  - b) The Constitution of Kenya promulgated on 27<sup>th</sup> August 2010.
4. We set out the in the following paragraphs the reasons by which we formed the opinion herein.

Within the constitution philosophy of the New Constitution there needs to be set up critical institutions to act as the facilitating agents for the implementation of the constitution. Among these, three Commissions have been identified as critical:

- **Judicial Service Commission (JSC)** as provided in Article 171 of the Constitution was to be in place **within 60 days** from the date of promulgation of the new constitution as required by Section 20 of the Sixth Schedule. The JSC is to establish new judiciary including recruitment and vetting of new judicial officers and the establishment of the Supreme Court. Given the complexity of the membership of this institution, it has implication on the Offices of the Chief Justice and Attorney General whose current holders, the new constitution envisage their exit at varying time.

- The Commission on Implementation of the Constitution (CIC) as established by Section 5 of the Sixth Schedule and the Revenue Allocation Commission (RAC) as established by Article 215 of the Constitution was to be in place **within 90 days** from the date of promulgation of the Constitution as provided in Section 25 of the Sixth Schedule to the Constitution.

## JSC

Article 171 of the Constitution, establishes the JSC which was to be in place **within 60 days** from the date of promulgation of the new constitution as required by Section 20 of the Sixth Schedule.

The following representatives in the JSC have been identified:

- (a) one Court of Appeal judge elected by the judges of the Court of Appeal;
- (b) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
- (c) two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
- (d) one person nominated by the Public Service Commission; and
- (e) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.

In addition the JSC is to consist of—

- (f) the Chief Justice, who shall be the chairperson of the Commission;
- (g) one Supreme Court judge elected by the judges of the Supreme Court;
- (h) the Attorney-General;

The Chief Justice is the chair of the JSC as provided in Article 171 of the Constitution. In case the CJ is indisposed or unavailable the Constitution has not provided for an alternate Chair. The Constitution having been promulgated, these issues should be addressed within the provisions of the Judicial Service Bill to allow for members of the JSC to elect a Chair for the purpose of a meeting in the event that the Chief Justice is unavailable. Otherwise the absence of the Chief Justice can jeopardize the operations of the JSC.

## CIC

According to Section 6 of the Sixth Schedule to the Constitution, the functions of the CIC is to monitor, facilitate and oversee the development of legislation and administrative procedures to implement the constitution in so doing coordinate with the AG and KLRC in preparing for tabling in parliament the legislation and administrative procedure required to implement the constitution.

The CIC is also required to regularly report to parliament, the Executive and the people of Kenya on progress and impediments in the implementation of the constitution.

It is further required to work with each constitutional commission to ensure that the letter and spirit of the constitution is respected.

Furthermore it is required to discharge the mandate envisaged in Chapter 15 of the Constitution applicable to all constitutional commissions and offices- protection of the sovereignty of the people, secure the observance of the democratic values and principles by all State organs and to promote constitutional. In a nutshell the CIC should have been in place to facilitate the implementation of the constitution.

## **RAC**

RAC is established by Section 25 of Sixth Schedule to the Constitution and the functions is provided in Article 216. The critical functions of RAC is to provide a framework and objective criteria for the allocation and division of revenue among different levels of Government and other State Organs.

## **IMPLICATION OF THE DELAY IN SETTING UP OF THE COMMISSIONS**

The delay in setting up the commissions has the following implications:

- Undermines implementation of the Constitution-delays the establishment of the Judiciary, the arm of the Government which is to interpret the meaning and application of the new Constitution for instance resolving disputes on the interpretation of the constitution and the law concerning the delimitation of parliamentary constituencies and wards.
- Circumvent the oversight role of parliament in vetting the nominees for the various constitutional offices as exemplified by the tabling of the names of the nominees to the CIC and RAC by the Executive to parliament on the 90<sup>th</sup> day (last day). The 90 days is to encompass the entire process of nominations by Executive, vetting by Parliament including background check, responding to the questionnaire provided by the Second Schedule of the CIC Act 2010 and according opportunity for objection by any person who may have grounds and/or knowledge that will bar any nominee from holding public office and in compliance with the Chapter 6 –Leadership & Integrity. Thus it also undermines the ethos of the new constitution that allows for public participation in the vetting process.

- The continued operations of Government without the necessary constitutional institutions and infrastructure undermine the rule of law and constitutionalism. For example
  - the continued preparation and generation of Bills by the Cabinet Subcommittee on implementation of the Constitution, MOJCA
  - the continued interpretation of the constitution by the discredited judiciary will generate bad precedents which at best will complicate the implementation of the constitution (Interim Independent Boundaries Commission Case) and at worst will create a constitutional crisis that would have two conflicting constitutional precedents at the same time.
  - In the absence of RAC, the Ministry of Finance through Treasury continue to allocate resources including those necessary for the implementation of this constitution under the direction of the Executive without the participation of an independent institution and objective criteria.
  - The RAC is to play an important role in advising parliament on how to allocate resources and the delay in its establishment in the short run means that the next budget critical to the implementation of the constitution will be generated and directed by the Executive in breach of the new Constitution. Through this mechanism the Executive can further frustrate the implementation of the new Constitution.
- These delays will have other far reaching implications on the implementation of the Constitution, for example:
  - Delay the setting up of the Independent Electoral and Boundaries Commission (IEBC) and the necessary enabling legislation that would undermine the holding free, fair and credible elections in the year 2012.
  - Jeopardize the anchoring and operationalisation of devolution including the establishment of the necessary legislative and institutional basis for the establishment of the Senate, the County government including its legislative structures and the office of the Governor.
  - The cumulative effect of the delays would result into constitutional crisis whereby a significant portion of the constitution is deferred and the necessary reform agenda is circumvented with the potential breakdown of law and order.

In fact the philosophy of the new constitution envisages that parliament may and can use delays as the mechanism to prevent the coming into full force of the new constitution and has thus established inbuilt mechanism that may lead to the dissolution of any parliament in the event of delay.

Article 261 in the Transitional and Consequences provision of the Constitution obligates parliament to enact legislation within time frame and any person may petition for dissolution of parliament on account of delay by parliament to enact the itemized legislation.

### **The legal framework and Mandate of the Interim Independent Boundaries Review Commission (IIBRC)**

Following the disputed presidential elections in 2007, the Independent Review Commission on the General Election held in Kenya in 2007 (Kriegler Commission) recommended the split of electoral body; one charged with the electoral process and the other delimiting the electoral boundaries.

As a result two interim bodies Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Commission (IIBRC) were formed pending the completion of the Constitutional Review process. The rationale was to immunise the electoral process from the emotive and political process attached to boundary delimitation.

This being the case, it is critical that the IIBRC completes the task of delimitation of boundaries within its time frame so that the successor body, Independent Electoral and Boundaries Commission (IEBC) is immunised from the emotive political process of boundary delimitation particularly when the IEBC is gearing for the crucial 2012 elections. The Interim Independent Boundaries Review Commission (IIBRC) was established by Parliament by Section 41B of the Constitution of Kenya (Amendment) Act, 2008 with a chairman and not more than eight other members. Its composition and function can be found under sections 41 B & C of the former constitution. Under the former constitution the IIBRC was responsible for:

- a) **making recommendations to Parliament** on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes taking into account:-
  - density of population, and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas
  - population trends;
  - means of communication;
  - geographical features; and
  - community interest;
- b) making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units; and
- c) the performance of such other functions as may be prescribed by Parliament.

The law that created the IIBRC had granted IIBC 24 months (two years from May 2009 when they commenced work) to review constituency, wards and administration boundaries.

With the promulgation of the New Constitution on 27<sup>th</sup> August 2010, the IIBRC Functions/mandate and timeline underwent radical change and its transition can be found under Sections 27 and 28 of the Sixth Schedule of the new Constitution wherein Sections 41 B and C have been retained in so far as the composition of the IIBC is concerned but significantly it **shall determine** the boundaries of constituencies and wards using the criteria given Article 89:

- a) Number of constituencies were set at 290
- b) Population became the overriding criteria for delimiting electoral boundaries-the constitution established a population quota for the establishment of every constituency. The only permissible deviation was on account of **geographical features** and **urban centre; community of interest, historical, economic and cultural ties; means of communication**. In this regard deviation not exceeding 40% for cities and sparsely populated areas and 30% for other areas.

The names and details determined by the commission are to be published in the gazette.

The changed mandate of IIBRC was not clearly articulated in the constitution promulgated on 27<sup>th</sup> August 2010 to avoid various interpretations. There are contested interpretations on the role and functions of IIBRC *vis-à-vis* their old mandate in the former constitution as well as the role of the new IEBC established by the constitution. Furthermore it is not obvious on how the IIBRC which had finite lifespan could safeguard and transmit its work to the new body Independent Electoral and Boundaries Commission (IEBC) in case it is not possible to complete its work.

Section 27(4) of the Sixth Schedule provides that IIBRC shall ensure that the first review of the constituencies undertaken in terms of the Constitution shall not result in the loss of a constituency existing on the effective date (27<sup>th</sup> August 2010).

The IIBRC proceeded to discharge its mandate by seeking to publish in the Kenya Gazette on 22<sup>nd</sup> November 2010 the names of the 290 constituencies. The Government Printer declined to publish. Subsequently a party challenged the ability of IIBC to publish the same in the Kenya Gazette contending that the IIBC was to make recommendations to parliament. An *ex parte* interim injunction was granted by the High Court Petition No.72 of 2010 precluding three commissioners from holding office and preventing the commission from causing the list of the 290 constituencies to be published by the Government printer.

Two further suits High Court Misc. App 339 of 2010 and Petition No. 74 of 2010 were filed in the same court-one seeking to quash the decision of the commission to publish the list of the 290 constituencies in the Gazette and the other to reinforce the previous Orders initially granted by ensuring the commission is stopped from publishing its work in any manner whatsoever.

Upon IIBRC contesting the first *ex parte* ruling before Justice Musinga, the court ruled on 26<sup>th</sup> November 2010 as follows:

- The three commissioners are validly in office
- IIBRC undertook its task in accordance with the constitution and was to gazette its findings however the commission failed to Gazette both the names and the boundaries of the constituencies at the same time. Consequently the court did vacate the injunction against gazetting.

Following the Court ruling the IIBRC on 26<sup>th</sup> November 2010 presented to the Departmental Committee on Justice and Legal Affairs a copy of the Gazette Notice containing the 290 constituencies and their boundaries and forwarded the original of the same to the Government Printer to publish in compliance with court ruling and upon further ruling the other case.

The net effect is that:

- There is no existing injunction preventing the Government printer from publishing the list and boundaries
- IIBRC has concluded its task and its term expired on 27<sup>th</sup> November 2010

### **OPTIONS FOR BREAKING THE IMPASSE**

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There have been four proposals on this as follows:

- a) Extend the life of the IIBRC for several months
- b) The IIEC to take up the mandate of the IIBRC
- c) Parliament to adopt the report of IIBRC and compel the printer to publish the names and boundaries of the 290 constituencies
- d) To set up the successor body of the IIEC and IIBRC(IEBC)



### **Option 1: Extension of life of IIBRC**

- This will require a constitutional amendments fraught with difficulties (attaining the necessary consensus and two-thirds threshold) and a long procedure which require a 90 day waiting period after the first reading (Article 256)
- Extending the life of IIBRC would further delay and complicate the process of establishing IEBC
- Extending the life of IIBRC will complicate and delay the preparations for the holding of the 2010 elections

### **Option 2: The IIEC to take up the mandate of the IIBRC**

- The constitutional philosophy, architecture and design preclude the IIEC as currently constituted to carry out the mandate and functions of the merged institutions. The IIEC does not have competences and experience on boundary delimitation and when was constituted such competency was not requirement for qualification.
- Transferring the functions and mandate of IIBRC to IIEC would transfer the attendant political baggage to the electoral process in contravention to the design and intention of parliament when constituting these two interim bodies.
- It would delay the establishment of the IEBC.

### **Option 3: Parliament to adopt the report of IIBRC and compel the printer to publish the names and boundaries of the 290 constituencies**

- The fundamental problem with this option is that it is not founded on the principles of the new constitution. It is actually founded on the principles of the former constitution which has been abrogated by the new constitution thus it does not have any legal or constitutional basis.
- There is a danger in using a simple majority threshold in parliament in dealing with a constitutional issue which requires a much higher threshold (Article 256). In any case even if parliament was to attain this high threshold and consider this a constitutional issue the long constitutional amendment procedure will apply(90 day waiting period after the first reading)
- Depending on the instrument of transmission of the report to parliament the report may face various challenges both parliamentary and judicial. It is not automatic that the adoption of the report by parliament will result in the legal and constitutional establishment of the 290 constituencies.

#### **Option 4: To set up the successor body of the IIEC and IIBRC (IEBC)**

This is the most legally and constitutionally viable option and has the following advantages:

- The new body will operate within the new constitutional framework and will not have the encumbrances of the former constitution
- The new body will have a limited flexibility to reopen the work of IIBRC for further consultation and consensus building.
- The new body will start to put in place the necessary infrastructure and competences to make sure the 2012 General Elections are held on time and are free, fair and credible.
- It will embark on the timely creation of wards for the County Assemblies in readiness for the 2012 general Election.
- It will also contribute towards the preparation of the necessary electoral legislation
- The work of IIBRC is preserved in the constitutional succession mechanism of the new body and can be consolidated in an enabling legislation that will also define the parameters of the aforesaid limited flexibility to reopen the work of IIBRC for further consultation and consensus building. Section 27(4) of the Sixth Schedule provides that IIBRC shall ensure that the first review of the constituencies undertaken in terms of the Constitution shall not result in the loss of a constituency existing on the effective date (27<sup>th</sup> August 2010).